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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE LUIS HUERTA ALVAREZ,

Defendant and Appellant.

H044713  
(Santa Clara County  
Super. Ct. No. B1576770)

Defendant Jorge Luis Huerta Alvarez appeals from a judgment in which he was found guilty of multiple lewd acts on a child, possession of child pornography, and use of an instrument to look under clothing. On appeal, defendant contends that the trial court erred when it ordered him to pay \$1,500 in attorney's fees for the services of his court-appointed counsel. We conclude that trial counsel rendered ineffective assistance when he failed to object to the imposition of attorney's fees. Accordingly, we reverse the judgment and remand the case for the trial court to conduct a hearing on defendant's ability to pay these fees.

## **I. Statement of the Case<sup>1</sup>**

In March 2017, the district attorney filed a first amended information charging defendant with three counts of committing a forcible lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (b)(1) - counts 1, 2, 3),<sup>2</sup> six counts of committing a lewd act on a child under the age of 12 (§ 288, subd. (a) - counts 4, 5, 6, 7, 8, 9), one count of producing child pornography (§ 311.1, subd. (a) - count 10), one count of possessing child pornography (§ 311.11, subd. (c)(1) - count 11), and one count of using an instrument to view under clothing with lewd intent (§ 647, subd. (j)(2) - count 12).

The jury found defendant guilty on counts 1 through 9, 11, and 12, but was unable to reach a verdict on count 10. The trial court declared a mistrial on count 10, which was eventually dismissed.

In May 2017, the trial court sentenced defendant to state prison for 48 years, eight months. The trial court ordered defendant to pay: a \$300 fine plus a penalty assessment of \$930 (§ 290.3); a restitution fine of \$10,000 (§ 1202.4, subd. (b)(2)); a court security fee of \$440 (§ 1465.8); a criminal conviction assessment of \$330 (Gov. Code, § 70373); a criminal justice administration fee of \$129.75 (Gov. Code, §§ 29550, 29550.1, 29550.2); and attorney's fees of \$1,500.

## **II. Discussion**

Section 987.8<sup>3</sup> authorizes the trial court to order a defendant who has received legal assistance provided by the public defender or private counsel appointed by the court to reimburse some or all of the county's costs. (§ 987.8, subd. (b).) The trial court may

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<sup>1</sup> We do not include the underlying facts because they are not relevant to the issues on appeal.

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise noted.

<sup>3</sup> We refer to the version of the statute in effect when defendant was sentenced.

order the payment of attorney's fees if, after notice and a hearing, it determines that the defendant has the ability to pay all or part of these costs. (§ 987.8, subds. (b), (e).)

“‘Ability to pay’ means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her.” (§ 987.8, subd. (g)(2).) The trial court shall consider, but not be limited to, the following: “(A) The defendant’s present financial position. [¶] (B) The defendant’s reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant’s reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison . . . shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors that may bear upon the defendant’s financial capability to reimburse the county for the costs of the legal assistance provided to the defendant.” (§ 987.8, subd. (g)(2).)

Defendant contends that the trial court erred when it ordered him to pay \$1,500 in attorney’s fees. The Attorney General contends that defendant has forfeited this claim by failing to object at the sentencing hearing.

Relying on this court’s decision in *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*), defendant counters that he did not forfeit his right to challenge the attorney’s fee order. In *Viray*, this court held that the defendant had not forfeited his right to challenge an order imposing attorney’s fees when no objection was made at the hearing before the trial court. (*Id.* at pp. 1215-1217.) In that case, the defense counsel submitted a written request seeking \$9,200 in fees. (*Id.* at p. 1193.) Defense counsel also brought the fee request to the trial court’s attention when he said, “‘We’re asking the Court to assess attorney’s fees’ and ‘We’re asking—the amount we’re asking is \$9,200 in attorneys fees.’

(Italics added.)” (*Id.* at p. 1216.) This court stated: “We do not believe that an appellate forfeiture can properly be predicated on the failure of a trial attorney to challenge an order concerning *his own fees*. It seems obvious to us that when a defendant’s attorney stands before the court asking for an order taking money from the client and giving it to the attorney’s employer, the representation is burdened with a patent conflict of interest and cannot be relied upon to vicariously attribute counsel’s omissions to the client. In such a situation the attorney cannot be viewed, and indeed should not be permitted to act, as the client’s representative.” (*Id.* at p. 1215.) This court further noted: “Counsel was at that moment clearly representing his employer, whose interests were flatly contrary to defendant’s. To all appearances, counsel had abandoned his erstwhile client to pursue the pecuniary interests of his boss. We express no view on the consequences of such a conflict other than to state that it is absurd to rely on the conduct of the attorney to impose a procedural forfeiture upon the client.” (*Id.* at p. 1216.)

After the decision in *Viray*, the California Supreme Court held that a defendant’s failure to object in the trial court to the imposition of various fees, including attorney’s fees pursuant to section 987.8, barred a challenge to those fees on appeal. (*People v. Aguilar* (2015) 60 Cal.4th 862, 866-868 (*Aguilar*)). However, as defendant points out, the *Aguilar* court noted that the case did not “present, and [it] therefore [did] not address, the question whether a challenge to an order for payment of the cost of the services of appointed counsel is forfeited when the failure to raise the challenge at sentencing may be attributable to a conflict of interest on trial counsel’s part.” (*Aguilar*, at p. 868, fn. 4, citing *Viray*, *supra*, 134 Cal.App.4th at pp. 1216-1217.)

Defendant contends that since he “was represented by the public defender’s office . . . [his] trial counsel had an implicit conflict of interest as to this issue.”

We first note that the present case is factually distinguishable from *Viray*. In *Viray*, the defendant’s public defender requested that the trial court order the defendant to

pay attorney's fees, thus creating a conflict of interest with his client. (*Viray, supra*, 134 Cal.App.4th at pp. 1193, 1216.) In contrast to *Viray*, here, defense counsel did not take a position in conflict with his client's interests.

Moreover, if a conflict of interest could be claimed in every case in which attorney's fees are ordered pursuant to section 987.8, the forfeiture rule set forth in *Aguilar* would be the exception, not the rule. The *Aguilar* court had the opportunity to distinguish orders for attorney's fees from orders for other types of fees and exempt them from the requirement that a defendant must object to preserve the issue on appeal. Since the court did not do so, this court is required under *Aguilar* to conclude that the failure to object to the attorney's fee order has been forfeited. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant contends that if his failure to object to the imposition of attorney's fees forfeited the issue on appeal, he was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. We agree.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) A defendant bears the burden of establishing ineffective assistance of counsel (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his or her counsel's performance was deficient and that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) A showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms" satisfies the deficient performance prong of this test. (*Id.* at p. 688.) "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the

circumstances, the challenged action ‘might be considered sound trial strategy.’ [Citation.]” (*Id.* at p. 689.) With respect to prejudice, a defendant must show “there is a reasonable probability”—meaning “a probability sufficient to undermine confidence in the outcome”—“that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Id.* at p. 694.)

Defendant argues that his trial counsel could not have made a reasonable tactical decision to refrain from objecting to the imposition of attorney’s fees. Here, at the time of his arrest, defendant was employed as a day laborer and earning \$12 per hour. Defendant and the victim’s mother, who was not his partner, rented a room together “due to financial necessity.” He had been in custody for over two years at the time of the sentencing hearing and thus had no income. He was sentenced to over 48 years in prison and ordered to pay \$12,129.75 in fines, fees, and assessments in addition to attorney’s fees. Thus, since the record establishes that defendant did not have the ability to pay attorney’s fees of \$1,500, trial counsel’s performance was deficient. But for trial counsel’s failure to object to the imposition of these fees, there is a reasonable probability that the trial court would not have ordered defendant to pay attorney’s fees.

The Attorney General argues that trial counsel “could reasonably have refrained from challenging the lack of hearing on [defendant’s] ability to pay because of what the hearing might have shown.” He argues that trial counsel may have known about defendant’s “present financial position,” such as “any assets” or “expected income.” He further argues that the record established that defendant was able to work in prison. First, given defendant’s employment as a day laborer and that he was unable to rent a room without financial assistance from another tenant, it is inconceivable that he had any assets or expected income with which to pay attorney’s fees. Second, there is nothing indicating that there were “unusual circumstances” that would have allowed the trial court to conclude that defendant had “a reasonably discernible future financial ability” to

pay attorney's fees even though he had been sentenced to prison (§ 987.8, subd. (g)(2)(B)). Accordingly, we reject these arguments.

### **III. Disposition**

The judgment is reversed. On remand, the trial court has the option to conduct a noticed hearing on defendant's ability to pay attorney fees pursuant to section 987.8. If, after such a hearing, the trial court determines that defendant has the ability to pay, it may impose a new order to pay attorney fees. The trial court shall prepare a new abstract of judgment and send a certified copy thereof to the Department of Corrections and Rehabilitation.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Grover, J.

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